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| DISTRICT COURT, DENVER COUNTY, COLORADO Denver City and County Building 1437 Bannock St. Denver, Colorado 80202 | FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 6 2011 10:57AM MDT Filing ID: 38528824 Review Clerk: Rebecca A Hendricks |
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**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF NON-EDUCATION APPROPRIATIONS AND TABOR PROVISIONS**

Plaintiffs, Anthony Lobato, et al., (“Plaintiffs”), submit this reply in support of their motion *in limine* to exclude evidence and argument concerning non-education appropriations made by the General Assembly and TABOR restrictions. (“Motion”).

INTRODUCTION

At the heart of Defendants’ dispute with the Motion is their disagreement with the Supreme Court’s carefully crafted test for trial. Plaintiffs showed in the Motion that non-education appropriations and general budget procedures such as TABOR cannot show that the public school funding system is rationally related to the mandates of the Education Clause, which is the Supreme Court’s *Lobato* test. In their Response to the Motion (“Response” or “Resp.”), Defendants do not dispute Plaintiffs’ point that the test crafted by the Supreme Court does not expressly include consideration of legislative action unrelated to education. Instead, Defendants argue that non-education appropriations and TABOR must be relevant because all legislative action must be considered in determining whether “the legislature has *acted rationally* when funding K-12 education.” (Resp. at 3, emphasis added.)

Defendants’ response fundamentally misapprehends Plaintiffs’ claims and the specific test crafted by the Supreme Court for trial. Plaintiffs’ claims and the Supreme Court do not require analysis of every legislative action and fiscal condition. The question is not whether the legislature acted “rationally,” regarding provisions for all state programs and services, but, more narrowly, whether the school funding system is rationally related to a specific end – the mandate of the Education Clause. As described below, the test put forward by Defendants departs substantively from the Supreme Court’s opinion in *Lobato*, and functionally reads the words “thorough and uniform” out of the Education Clause. Because Defendants’ entire resistance to

the Motion rests on their advancement of an erroneous standard, the Motion should be granted in all respects.

ARGUMENT

I. NON-EDUCATION APPROPRIATIONS DO NOT MAKE THE SYSTEM OF EDUCATION MORE OR LESS LIKELY ADEQUATE UNDER THE SUPREME COURT STANDARD.

Defendants’ conflate the specific test for an Education Clause claim dictated by the Colorado Supreme Court in *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009), with the traditional rational basis test for substantive due process and equal protection claims. These tests differ in the types of purposes that may be considered under the rational basis review. While the traditional rational basis test for substantive due process and equal protection claims allows the government to identify *any* legitimate or compelling state purpose, *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1022-23 (Colo. 1982), the *Lobato* Court made clear that the *only* state purpose relevant to this case is the Education Clause’s “constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.” *Lobato*, 218 P.3d at 374. If the Defendants are allowed to expand the scope of this case beyond the single purpose expressly identified by the Supreme Court in *Lobato*, Defendants would shift the focus of this case away from students, and effectively transform Plaintiffs’ claims brought under the Education Clause into substantive due process claims. Defendants’ position would thus read the “thorough and uniform” language out of the Constitution and render the *Lobato* decision meaningless.

The differences between the *Lobato* Education Clause test and the due process test explain why Defendants’ Response fails:

The *Lobato* Education Clause Test. Before articulating the test for Plaintiffs’ claims, the

Lobato Court recognized that “a rational basis review satisfies the judiciary's obligation to evaluate the constitutionality of the public school system without unduly infringing on the legislature’s policymaking authority.” *Lobato*, 218 P.3d at 374. As shown in the Motion, the Supreme Court therefore undoubtedly took care to refrain from intruding on the legislature’s authority when crafting the test for trial.

Next, the Court unambiguously articulated the test for trial, and clearly identified “the constitutional mandate of a ‘thorough and uniform’ system of public education” as the only state purpose to be analyzed under the rational basis review. *Id.* And, when the court noted in the very next sentence that deference must be given to the legislature’s fiscal and policy judgments, that statement was limited by the preceding sentence to fiscal and policy judgments regarding education. Accordingly, Defendants are wrong to view that statement as an invitation to identify additional, non-education state purposes. (Resp. at 3.)

The result, that general fiscal conditions have no bearing on an Education Clause claim, is consistent other prominent education funding cases, such as *Abbott v. Burke*, 2011 WL 1990554, at *13-14 (N.J. 2011), *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754-55 (N.H. 2002), and *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 23 (1995). Defendants fail to meaningfully distinguish these. The relevant point of all three cases is unremarkable: while fiscal pressure may explain *why* students’ rights have been violated, it has no bearing on the issue *whether* students’ rights have been violated. That is, Defendants cannot, as a legal matter, excuse the legislature’s failure to comply with the mandates of the Education Clause by pointing to seemingly difficult decisions.

Due Process Test. In contrast to the *Lobato* test, which considers the specific state

purpose of the Education Clause, the due process test looks to any legitimate state purpose. *City & County of Broomfield v. Farmers Res. & Irr. Co.*, 239 P.3d 1270, 1277 (Colo. 2010) (“the party challenging the rule or statute has the burden of establishing beyond a reasonable doubt that the rule lacks a rational relationship to a legitimate governmental interest.”); *Lujan.*, 649 P.2d at 1016 (issue for equal protection claims is “whether the state action is rationally related to a legitimate state purpose”).

At least three aspects of Defendants’ Response confirm their confusion of the two tests. *First*, Defendants frame the issue broadly as whether the legislature has acted “rationally when funding K-12 education.” (Motion at 3.) As just explained, the issue is not, as it is with traditional due process challenges, whether the legislature generally acted “rationally.” The issue is narrower: whether the school finance system is rationally related to satisfying the Education Clause. *Second*, Defendants make no attempt to respond to Plaintiffs’ point that by identifying the specific state purpose to consider under the rational basis review, the Supreme Court left no room for additional state purposes. (Motion at 5.) *Third*, Defendants continue to cite the wrong section of *Lujan*. In arguing that all appropriations are relevant here, Defendants rely on the *Lujan* court’s examination of several sections of Article IX of the Constitution. (Resp. at 4.) But the discussion they cite comes from the court’s discussion of the Equal Protection claim in *Lujan*, not the discussion of the Education Clause claim. *Compare Lujan*, 649 P.2d at 1022-24 (Section IV.C of the opinion, discussing “Rational Basis Review” as part of the “Equal Protection Analysis”); *with id.* at 1024-25 (Section V of the opinion, discussing separate claim under the Education Clause). Thus, Defendants’ Response confirms that they are operating under the wrong test in arguing that any legislative action can render the current school system

constitutional.

By arguing that any state purpose is fair game for the rational basis review here, and that non-education appropriations are relevant, Defendants attempt to reduce Plaintiffs' Education Clause claim to a due process challenge. The attempt is foreclosed by the existence of the "thorough and uniform" clause, the pleadings in this case, and by the Supreme Court. Once Plaintiffs prevail on the limited issue whether the current system of public schools deviates from the Education Clause, the legislature must be afforded the opportunity to address the effects that any fiscal distress and unrelated state programs have on compliance with the Constitution. Such issues are not germane to this trial and not within the province of Defendants or the Court to address in the first instance. *Lobato*, 218 P.3d at 375 & n.21.

II. EVIDENCE OF NON-EDUCATION STATE PROGRAMS HAS NO LOGICAL RELEVANCE TO THE ISSUE WHETHER PLAINTIFFS' RIGHTS UNDER THE EDUCATION CLAUSE HAVE BEEN VIOLATED.

Defendants' attempt to shift focus away from students is not only contrary to the clear test crafted by the Supreme Court, but also defies logic. This case is about students, not politics. Plaintiffs claim that they have not received a thorough and uniform system of education guaranteed by the Constitution. The truth of their claim is not made more or less likely by any fiscal distress or the political desire of the legislature to fund a host of other state programs. A student passing through an inadequate system of public schools year after year is not more or less likely to have received access to an adequate system of education because the legislature would like to spend money on health and human services or roads. A failing system of schools is not more or less likely to be rendered adequate because the legislature would rather provide tax credits and exemptions than use the revenue for public education. For this additional reason,

Defendants' evidence and argument of non-education appropriations, TABOR, and fiscal pressure should be excluded. CRE 401.

Finally, Defendants fail to refute Plaintiffs' contention that education stands apart from human services, corrections, roads, and other state services in the constitutional framework. Plaintiffs' do not, as Defendants suggest, base this contention on any difference between the words "support" and "maintain." (Resp. at 2 n.1). Rather, Plaintiffs base their contention on the phrase "thorough and uniform," which defines the type of education required by the Constitution, and the absence of any similar qualifying terms in constitutional provisions concerning human services, corrections, and roads. Throughout their briefing on the Motion and their own Rule 56(h) motion, Defendants have repeatedly failed to point to any qualifying phrases similar to "thorough and uniform" when arguing that all non-education state services are constitutionally required to the same extent required by the Education Clause.

Evidence of non-education appropriations, TABOR, or the overall budget is irrelevant, immaterial, and should be excluded. If the current public school finance system is not rationally related to the "constitutional mandate that the General Assembly provide a 'thorough and uniform' public school system," *Lobato*, 218 P.3d at 374, then it violates the Education Clause, regardless of whether it is arguably generally rational in light of TABOR, prison spending, or the overall budget. Nothing in the Education Clause or the *Lobato* decision frees the legislature from this constitutional mandate. Therefore, the fact that Defendants can explain why the legislature has failed to adequately fund public education does cure the violation of Plaintiffs' rights under the Education Clause.

Because Defendants' entire Response is premised on their confusion of the *Lobato* test with the test for due process claims, Defendants have failed to refute the Motion. The evidence of non-education appropriations and the effects of TABOR have nothing to do with students or the actual quality of the education they receive. Defendants' efforts to shift the focus of this case from students to politics is understandable given the facts of this case, but the quality of the public school system provided to students must stand or fall on its own. The quality of that system cannot logically be saved or enhanced by the legislature's desire to spend money on other programs or tax credits. The quality of that system must be measured by analyzing the relationship between the education funding system and the mandate of the Education Clause. Because this analysis leaves no room for non-education appropriations and fiscal pressure brought on by TABOR, evidence of such pressures has no relevance here and should be excluded.¹

CONCLUSION

For the reasons set forth above and in the Motion, the Motion should be granted in all respects. The Court should exclude Evidence of non-education appropriations, TABOR, and general fiscal pressures offered for the purpose of showing that the school finance system is rationally related to the Education Clause.

¹ In the event Defendants are allowed to pursue such evidence, Plaintiffs must be allowed to respond. Thus, Plaintiffs' disclosure of witnesses on these topics does not mean that Plaintiffs waived their objection or in any way made the topics relevant.

Dated: July 6, 2011

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The original, executed document is on file at the offices of Davis Graham & Stubbs LLP.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of July, 2011, a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE EVIDENCE OF NON-EDUCATION APPROPRIATIONS AND TABOR PROVISIONS** was filed and served, via LexisNexis® File & Serve, addressed to the following:

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